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Supreme Court of the United States

OCTOBER TERM, 1983

JOHN BRIGGS, *et al.*,
Petitioners,

v.

GUY GOODWIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

QUESTIONS PRESENTED

Whether this Court's decision in Briscoe v. LaHue, ___ U.S. ___, 103 S.Ct. 1108 (1983), holding that 42 U.S.C. §1983 does not authorize suit against a police officer for false testimony in a criminal trial, means that:

a) Where a government attorney has placed an informer with grand jury witnesses and their counsel, some of the witnesses being targets, and where the informer continues in association with some of such witnesses, sometimes in meetings with their attorneys, after they have been indicted, and where the informer

reports defense strategy to the government and the government attorney takes no effective action to stop the conduct of the informer placed by him in the defense camp, the government attorney somehow acquires immunity from a claimed violation of Sixth Amendment rights because at one point he was called to the witness stand and falsely advised the court that he had not placed an informer in the defense camp?

b) A government attorney, a defendant in a Bivens suit based on a claim that Sixth Amendment rights had been violated by his having given false advice to a court and a group of grand jury targets that he had not placed informers among them, may claim "witness immunity" with respect to such advice?

LIST OF ALL PARTIES

Petitioners:

John Briggs

Scott Camil
Peter P. Mahoney
Stanley K. Michelson
John Kniffin
William Patterson
Alton Foss
Donald Perdue
Robert Wayne Beverly
Jack Jennings
Bruce Horton
John Chambers

Respondent:

Guy Goodwin

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OPINIONS BELOW

The opinion of the Court of Appeals dated July 8, 1983, from which this petition is filed, is reported at 712 F.2d 1444 (D.C. Cir. 1983) (see Appendix A, infra, 1a et seq.). The prior opinion of the Court of Appeals dated January 11, 1983, is reported at 698 F.2d 486 (Appendix B, infra, 14a et seq.). The opinion and order of the district court dated September 19, 1980 (Appendix C, infra, 36a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on July 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defence.

STATEMENT OF THE CASE[1]

On July 7, 1972, a grand jury in Tallahasee, Florida, subpoenaed petitioners to testify concerning their activities in connection with the Vietnam Veterans Against the War (VVAW). The subpoenas were returnable three days later on July

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[1] Large parts of this statement are drawn verbatim from the opinion of the Court of Appeals dated January 11, 1983, reported at 698 F.2d 486. Appendix B, infra, 16a et seq.

10, 1972. A group of lawyers hastily assembled to represent the subpoenaed witnesses. Because of the extreme time pressure involved the lawyers counselled many of the potential witnesses on a group basis.

Unknown to either the petitioners or their lawyers, one of those subpoenaed, Emerson Poe, was a paid undercover FBI informant. Defendant Goodwin had subponaed Poe (and another informer, Arthur Franz) to appear at the same time as petitioners in order to keep secret their status as informers. Despite this status, Poe attended a group meeting of the petitioners and their lawyers on July 8, 1972, in preparation for the grand jury. He also signed a retainer form with petitioners' attorneys, though the scope of that retainer is an issue between the parties. Throughout the grand jury proceedings, Poe consulted with

petitioners' lawyers and was present in the cramped hallway where the petitioners consulted with their lawyers.

Recurring rumors of police and FBI infiltration of VVAW prompted concern among the petitioners that informants might be in their midst. Group counsel filed a motion with the district court to discover whether any of the witnesses represented by them were government informants. To clarify that motion, the district court requested that counsel list the witnesses in question and their respective attorneys. On July 12, that list was presented orally on the record before the court. Emerson Poe was among the names listed. During discussion of the motion the next day, the court peremptorily directed Goodwin to take the stand and be sworn. He was asked one question:

> THE COURT: Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United

States of America?

THE WITNESS [GUY GOODWIN]: No, Your Honor.

What followed the above colloquy is essential to the issue now before this Court. After the single question was asked by the court and answered by Goodwin, counsel for the subpoenaed witness asked permission to cross-examine Goodwin. The court summarily refused this request. What is more, Goodwin specifically stated that, although he would answer questions posed by the court, he did "not wish to be subjected to cross-examination."

Goodwin knew, at the time that he answered the judge's question, that Poe was an FBI informant. He also had the opportunity to see Poe among some of the petitioners and their attorneys as they waited in the hall outside of the grand jury room. On the other hand, Goodwin

claims to have issued instructions that Poe was not to become involved with the petitioners' defense efforts or their attorneys.

Later that day, the grand jury indicted six of the petitioners on federal criminal charges relating to an alleged conspiracy to cross state lines to instigate a riot. Two other petitioners were subsequently indicted on the same charges. The grand jury granted the remaining four petitioners immunity; when they refused to testify, they were convicted of contempt.

Shortly after the grand jury proceeding, Poe, at the behest of the FBI, retained a local lawyer to inform petitioners' attorneys that he would be representing Poe in any further proceedings. The petitioners continued to take Poe into their confidence and discuss aspects of the upcoming trial with him. Poe attended a number of meetings among

petitioners at which they discussed defense matters. Petitioners' attorneys were sometimes present. On at least one occasion, petitioners questioned Poe's presence at these meetings because he was not an actual defendant.

Poe reported to the FBI regarding his attendance at meetings, his other involvement with the petitioners, and the information he acquired. The FBI routinely passed such information on to the Justice Department. Among the information that Poe provided the FBI was information concerning the severe financial impact of a pending motion on the defense team; the intention of one of the petitioners to visit a potential witness for the government; friction among members of the defense team; and a jury-selection survey being conducted by the defense. Poe agreed to help petitioners collect

information for the survey, but he failed to do so or reported false information.

When he returned to Washington, Goodwin was informed of Poe's involvement with petitioners' counsel during the grand jury, as well as his continued involvement with petitioners as they prepared their defense to the grand jury's indictment, but he took no action effectively to terminate Poe's contact with petitioners or their defense committee. Goodwin's inaction continued for a full year after his denial to the court, as Poe continued passing information to the government.

Not until August 17, 1973, pursuant to the Jencks Act, did petitioners obtain written materials revealing Poe's informant status. At a pretrial hearing in their criminal prosecution, the indicted petitioners succeeded in suppressing certain evidence discovered by Poe and

turned over to the FBI. The court held that the means used to gather the evidence violated the Sixth Amendment.

At trial, the jury acquitted petitioners of all charges.

Petitioners brought this action alleging that Goodwin violated their Sixth Amendment rights both directly through his misleading statement on witness informants and indirectly through his failure to remedy the situation when it became apparent that Poe was gathering confidential defense information and reporting it to the FBI. Goodwin moved for dismissal of the complaint, arguing that as a public prosecutor he was entitled to absolute immunity from private damage suits for actions taken in his official capacity. He also claimed that his statement was made while he was a "witness" in court, and that he should be entitled to absolute

witness immunity. Both the district court and a panel of the Court of Appeals for the District of Columbia Circuit denied a motion to dismiss on either of these immunity grounds. Briggs v. Goodwin, 569 F.2d 10, cert. den. 437 U.S. 904 (1978).[2] Instead, the Court of Appeals determined that Goodwin was only entitled to a qualified immunity; he would be protected from private suit only if his actions were taken in good faith.

On remand, after much discovery, Goodwin moved for summary judgment. The district court rejected a renewed claim of absolute immunity, but granted summary judgment on a finding that Goodwin had established his good faith because he "in fact believed in the veracity of his

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[2]The issue of witness immunity was expressly presented to this Court in the petition for writ of certiorari.

statement" concerning informants represented by common counsel. Petitioners contended that material issues of fact remained in dispute.

The Court of Appeals decision, dated January 11, 1983 (amended January 17, 1983, infra, 14a), reversed the decision of the district court granting summary judgment, holding that there were in fact material issues of fact.

In due course, Goodwin filed a petition for rehearing calling to the attention of the Court of Appeals the decision of this Court in Briscoe v. LaHue decided on March 7, 1983.

On July 8, 1983, the Court of Appeals, responding to the petition for rehearing, vacated its prior opinion and affirmed the judgment of the district court granting summary judgment for Goodwin (infra, 1a).

In so ruling, the Court of Appeals held that this Court's ruling in Briscoe with respect to witness immunity should be applied to the facts and circumstances of this case. It should be observed that in an earlier opinion on an interlocutory appeal, Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977), cert. den., 437 U.S. 904 (1978), the Court's opinion, per McGowan, J., had considered the claims of both prosecutorial and witness immunity and had rejected both. The former was denied on the grounds that within the principles of Imbler v. Pachtman, 424 U.S. 409 (1976), Goodwin was functioning in an investigative rather than a prosecutive role. With respect to the claim of witness immunity, the Court concluded that witness immunity doctrine did not encompass the circumstances of this case. The Court explained its opinion on this score as follows:

[W]e doubt that respondent would seriously undertake to maintain that he was an ordinary witness. Although he was called upon by the court to make a representation of fact in a courtroom after being sworn, that act did not involve giving testimonial evidence in the usual sense at a trial or even before grand jurors. He was directed to do so by the court in order promptly to get a representation from counsel on the record under oath, and thereby to lay to rest the legitimate claim of appellees that they were entitled to know, before submitting to the compulsion of the subpoenas, whether their number included Government undercover agents.

That claim raised a question going to the very integrity of the manner in which the grand jury proceeding was being conducted. Had appellant volunteered to represent as an officer of the court that no informers were involved, and had the parties been content with that, there would be no issue as to witness immunity worthy of the name. The difference between the falsity of such a nontestimonial representation, on the one hand, and the technical consequence of perjury attached to a statement under oath, on the other, is not at the heart of the immunity issue in this appeal. The question is whether appellant is wholly immune from a civil suit based upon his utterance of an allegedly false statement in the context of countering a challenge to the manner in which he was conducting a grand jury inquiry.

The statement assailed here was prompted by, and directly incidental to,

> appellant's status as a prosecutor managing and administering an investigation. Appellant's unqualified negative response to the district judge's plain and abrupt question was essential to the forward progress of the grand jury investigation, for which appellant as a federal prosecutor had been charged by his superiors with the responsibility. To the extent that appellant's one word answer is viewed as a testimonial act, it was one occasioned by, and critical to, appellant's discharge of that responsibility.
>
> **** It is obvious from the transcript that the court did not consider appellant to be an ordinary witness. It ordered him to take the stand; it asked him one question; and it forthwith excused him. Indeed, when appellees' counsel sought leave to cross-examine, the court denied it. The policies underlying the common law doctrine of witness immunity are tangential, and essentially irrelevant, to the question of whether appellant--a prosecutor functioning in an investigative context--should be accorded complete invulnerability to suit for the consequences of an act performed in that capacity.

The Court of Appeals additionally expressed doubt whether witness immunity principles were in any event applicable to Bivens-type actions alleging claims of constitutional violation.

In its opinion on rehearing, the Court of Appeals, per Bazelon, J., acknowledged that its earlier opinion had found witness immunity to be inapplicable to the facts in this case, even if witness immunity were generally applicable to constitutional torts. Judge Bazelon's opinion simply rejected the view of this case reflected in Judge McGowan's earlier opinion. While basing his opinion on Briscoe, Judge Bazelon rejected the earlier opinion even to the extent that Judge McGowan had assumed the possibility of immunity of the type held in Briscoe.

REASONS FOR GRANTING THE WRIT

A divided court held in Briscoe that principles of witness immunity barred a suit for damages under 42 U.S.C. §1983 against a police officer testifying in a criminal case. The decision of the Court of Appeals in this case represents a vast extension of that ruling probably not

intended by this Court and threatens very seriously constitutional rights which the Court has sought to protect.

1. Briscoe held that a police officer who lied at a criminal trial has witness immunity as against a damage suit against him under 42 U.S.C. §1983. The policeman's false testimony was the only act claimed to have violated the plaintiff's constitutional rights.

This is a wholly different case. As pointed out in the main brief in the Court of Appeals, the gravamen of the complaint was that defendant Goodwin violated petitioners' rights guaranteed by the Sixth Amendment, not merely by his sworn statement in court but by his acts and omissions both before and after that statement was made.

As petitioners chronicled in their brief in the Court of Appeals, Goodwin expressly decided to require Poe and

another informer to appear at the grand jury at the same time as petitioners, to insure that they would not suspect the informer status of the two men. Goodwin did this well knowing the crowded condition of the courthouse, which would make it virtually impossible to have attorney-client discussions without being overheard by the informer-witnesses.

After Goodwin's statement to the court--in fact, after the grand jury had issued its first indictment[3]--and everyone had returned home, Goodwin received additional information concerning Poe's involvement with petitioners' attorneys during the grand jury. He nonetheless did not direct Poe to remove himself from the defense camp.

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[3]A superceding indictment was issued on October 18, 1972.

Again, as argued in the brief before the Court of Appeals and reflected in that court's statement of the facts, during the year that followed, Poe continued his relations with petitioners and their defense committee as they prepared for trial, attending meetings where attorneys were sometimes present. He continually passed information to the FBI concerning defense strategy and problems, including but not limited to defense plans for the first arraignment, the nature of defense committee fund-raising, plans of defendants to meet with their lawyers, and plans with respect to a jury selection survey. Poe even obtained information from defense committee members that formed the basis for a search warrant for evidence which was used in the Gainesville Eight trial and was instrumental in the superceding indictment of two of the petitioners.

Of course, information given by Poe to the FBI was then passed on to the Justice Department attorneys.[4] Goodwin took no action to terminate these Sixth Amendment violations.

In this posture, Goodwin's testimony frosted the cake of Sixth Amendment violations but was not the sine qua non thereof. Had he not testified at all, there would still have been Sixth Amendment violations.

The most that could possibly be argued is that Briscoe means that, at the trial for violation of petitioners' constitutional rights, evidence of Goodwin's false testimony might not be admissible. But that is a far cry from arguing that the entire case is to be dismissed

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[4]Plainly, this distinguishes this case from Weatherford v. Bursey, 429 U.S. 545 (1977).

because Goodwin gave some false testimony where there is ample evidence of Sixth Amendment violations not dependent upon such testimony.

In the paragraphs below we point out other reasons which render Briscoe wholly inapplicable to this case, so that even the limited impact of exclusion of particular evidence would be inappropriate.

2. Briscoe applied principles of witness immunity to a witness in the ordinary and familiar role. There were important historical antecedents in the law of defamation upon which this Court drew.

Goodwin, as the Court of Appeals recognized as early as 1977, was no ordinary witness. He was a prosecutor performing an investigatory role. He was in absolutely no different position from any lawyer standing before a lectern and making a representation.

The differences between Goodwin and the police officer in Briscoe strongly indicate that the historical and policy considerations mentioned by this Court in Briscoe do not apply to this case. According to this Court in Briscoe, without immunity,

> [a] witness's apprehension of subsequent damages liability might induce the two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. 103 S.Ct. at 1114.

Therefore, the Court concluded:

> The truth-finding process is better served if the witness's testimony is submitted to "the crucible of the judicial process so that the fact finder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." Id. at 1115.

Upon examining the reasons which underly traditional witness immunity and this Court's conclusion concerning the judicial process, it is clear that Goodwin was so far from being a witness in the

sense considered in Briscoe that the decision in that case does not apply to the facts of this case.

The "testimony" in question herein occurred as a result of a motion filed by counsel for subpoenaed witnesses during the Tallahassee grand jury in which counsel asked whether any of their clients were agents or informants. It was the court's denial of cross-examination and Goodwin's indication that he wished not to be cross-examined which take this completely out of the facts and reasoning of the Briscoe case.

Because the Tallahassee court refused to permit counsel to cross-examine Goodwin, it removed him from the "crucible of the judicial process" which this Court indicated would protect criminal defendants and maintain the integrity of court proceedings, and which is at the heart of Briscoe.

We observe that, despite an apparent effort by the Court of Appeals in its opinion on rehearing to analyze the appropriateness of applying Briscoe to Goodwin, it makes no mention whatever of this decisive difference between the two cases.

Yet this difference distinguishes the two cases completely. In the one case the judicial process is vindicated by the use of cross-examination, and this Court has held that that process should be protected by immunity. In the other, the judicial process has been frustrated by the denial of the "crucible" of cross-examination and hardly merits immunity.

In his opinion, Judge Bazelon says: "Briscoe emphasized the concern that the absence of immunity would interfere with the ability of 'judicial proceedings' to determine where the truth lies." (Slip op. at 9, infra, 9a.) But obviously that

proposition holds water only to the extent that the proceedings included the accepted method of determining "where the truth lies," i.e., cross-examination.

3. Briscoe involved a police officer testifying as a witness in a criminal trial and setting forth facts in the matter sub judice. Goodwin was an officer of the court, advising it and his adversaries of the workings of the grand jury proceedings then underway.

There is an enormous difference between the two circumstances, a difference which should be determinative of the outcome. When a policeman testifies as to the facts of a case, he has a legitimate claim that his status should be no different from that of any witness who historically has had the benefit of a privilege.

But lawyers addressing a court do not have a privilege to lie and be protected from the consequences of so doing if their

lie was relied upon by an adversary and caused damage.

We suppose it would be conceded that if Goodwin, performing non-prosecutorial investigative activities, stood before the bench and, in response to the court's inquiry, made a false statement to the court that he made from the witness stand, he could not claim immunity if his statement effected a denial of constitutional rights. How is it possible, then, that by the mere fact that the judge asked him to move to the witness chair and take an oath, but did not permit him to be cross-examined, by some unexplained alchemy Goodwin acquired an immunity that he did not have when he stood before the bench?

Of course, the argument may be made that Goodwin is entitled to prosecutorial immunity. But that is a wholly different issue from that decided by the Court of Appeals on this occasion. The question of

prosecutorial immunity is not before the Court at this time. It was decided in 1978, Briggs v. Goodwin, 569 F.2d 10, and this Court did not accept a petition for a writ of certiorari. 437 U.S. 900.

We start, therefore, with the fact that Goodwin was not entitled to prosecutorial immunity but was to be treated like any lawyer. Can one seriously believe that a lawyer making a false statement to the court, to the damage of his adversary, will acquire absolute witness immunity if for some reason the court moves him from the lectern to the witness stand and puts him under oath?

4. In granting police witnesses absolute immunity consistent with Pierson v. Ray, 386 U.S. 547 (1967), and Imbler, this Court in Briscoe expressed the concern that, were such immunity denied, large numbers of lawsuits against police officers might result:

> Section 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, "could be expected with some frequency." Cf. Imbler v. Pachtman, supra, at 425. Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the state's official witnesses.

103 S.Ct. at 1120.

There is obviously no danger that prosecuting attorneys will be directed by courts to make statements to the court under oath in "scores of cases" each year. Nor is it likely that the rare prosecutor who is required by a court to give a sworn statement in the course of his performance of a non-prosecutive function, will be shielded from cross-examination and removed from the "crucible of the judicial process," as Goodwin was. Should that rare event occur and the prosecutor make a false statement to the court under oath, the person whose constitutional rights have been violated by his false statement

must not also be deprived of his or her only remaining protection--a civil rights damage action. For in truth, no other safeguard exists for that person.

The Court in Imbler expressed concern lest prosecutors be exposed to defending themselves as to the outcome of every case, just as police witnesses might be exposed at the end of every case where they testify. But in Imbler the Court did not immunize prosecutors when they perform non-prosecutorial functions, and in Briscoe the Court did not immunize police officers who deny constitutional rights in ways other than by testifying. Thus, the Court is not generally immunizing all law enforcement officials; it affords immunity only to the extent that the law enforcement official is part of the routine of the overwhelming number of prosecutions, i.e., the act of prosecution by a prosecutor or the police giving testimony.

Nothing in Imbler or Briscoe extends immunity to acts constituting a denial of constitutional rights by other conduct of either police officers or prosecuting attorneys.

5. This Court in Briscoe was very sensitive to the fact that its ruling barred a "possible path to recovery for the defendants." The Court, however, relying on the oft-quoted statement by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, cert. den. 339 U.S. 949, to the effect that "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation," sustained immunity.

The question, then, is whether this case is one which merits that treatment. The opinion of the Court of Appeals makes clear that it did not think this was such

a case. In footnote 36 (infra, 11a), the court says:

> While upholding appellee's absolute immunity claim, we note our deep concern. The allegations in this case painfully illustrate the significant costs of this holding--not only to the appellant, but to the integrity of our criminal justice system as well. As the state's lawyer and an officer of the court, a prosecutor has a special obligation to discharge his duties lawfully and fairly. In this case, appellant claims that a prosecutor perjured himself from the witness stand during a criminal investigation. Our response to appellant's claim is that a civil damages action, whatever its merits, may not be pursued against the prosecutor. Instead, appellant must rely on the possibility of a prosecution of the prosecutor by his fellow prosecutors. We find it troubling that our system of justice, which rests so fundamentally on the consent of the governed, offers such inadequate remedies for official violations of individuals' constitutional rights.

In this footnote, the Court of Appeals was expressing a concern often articulated in the opinions of this Court: that for the judicial system "to perform its high function in the best way, justice

must satisfy the appearance of justice." In Re Murchinson, 349 U.S. 133, 136 (1955); Offutt v. United States, 348 U.S. 11, 14 (1955); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1980); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 319 n. 53 (1978).

In spite of its reservations, however, the Court of Appeals felt compelled by Briscoe to uphold the claim of immunity. It is respectfully submitted that the Court of Appeals failed to give effect to the significant differences between the instant case and Briscoe, and in so doing extended the immunity there provided far beyond what this Court intended.

CONCLUSION

Briscoe should not be read as a general license to extend immunity whenever the denial of constitutional rights has a testimonial dimension. If it is so read--as the Court of Appeals did in this

case--a gratuitous and unnecessary denial of constitutional rights will have been fashioned. This Court did not intend that result.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 6, 1983.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2269

JOHN BRIGGS, ET AL., APPELLANTS

v.

GUY GOODWIN, ET AL.

On Petition for Rehearing

Filed: July 8, 1983

Robert Boehm, *Morton Stavis*, *Cameron Cunningham*, *Brady Coleman*, *Jack Levine*, and *Philip J. Hirschkop* were on the Supplemental Memorandum for appellants.

Robert F. Muse and *Jacob A. Stein* were on the Petition for Rehearing and Supplemental Memorandum for appellees.

Before: GINSBURG, *Circuit Judge*, and BAZELON and MACKINNON, *Senior Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinion concurring in the judgment filed by *Senior Circuit Judge* MACKINNON.

BAZELON, *Senior Circuit Judge*: The allegations in this case raise troubling issues of law: Appellant Briggs alleges that appellee Goodwin, a United States Attorney, knowingly gave false sworn testimony before a district court, which resulted in a violation of appellant's constitutional rights. Appellee asserts entitlement to absolute immunity from civil liability arising from his testimony. This court rejected that claim. Thereafter the Supreme Court decided *Briscoe v. LaHue* [1] and we granted rehearing to reconsider the issue in light of that decision. Upon such reconsideration, we are compelled to the conclusion that *Briscoe* entitles appellee to absolute immunity as a witness.

I

The factual background and procedural history in this case have been fully detailed in our earlier opinions, *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983) (*"Briggs II"*); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (*"Briggs I"*); only a brief review is required here.

The case arises out of a grand jury proceeding in which several grand jury witnesses, including appellant Briggs, were represented by the same counsel.[2] In response to rumors that some of the grand jury witnesses were government informants, the witnesses filed a motion in district court to compel the government to disclose whether any government informants were among the witnesses represented by group counsel. At the hear-

[1] 51 U.S.L.W. 4247 (U.S. March 8, 1983).

[2] For a more detailed account, see *Briggs I*, 569 F.2d 10, 13-14 (D.C. Cir. 1977).

ing on the motion, appellee Goodwin, who was the prosecutor in charge of the grand jury investigation, took the stand and was asked under oath whether any of the witnesses represented by group counsel were government informants. Goodwin answered, "No." Appellant Briggs alleges that Goodwin's response was false, that Goodwin knew it to be false, and that the allegedly false statement caused Briggs to share defense strategy with an informant, who passed it back into the hands of the government.

Briggs sued Goodwin, *inter alia*, for damages arising out of violation of Briggs's sixth amendment rights. Goodwin asserted absolute immunity on two grounds: 1) as a prosecutor, and 2) as a witness. The district court refused to dismiss the case on either ground, but agreed to certify the question of prosecutorial immunity for interlocutory appeal.

In a 2-1 decision, this court rejected Goodwin's prosecutorial immunity claim. *Briggs I*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). Applying the "functional" test outlined in *Imbler v. Pachtman*,[3] the court found that at the time of the statement Goodwin was operating in his investigatory role.[4] In that capacity, he was not entitled to the absolute immunity conferred on prosecutors acting as advocates, but only to the qualified immunity provided for police and other government officials acting as investigators.[5]

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[3] 424 U.S. 409 (1976).

[4] *Briggs I*, 569 F.2d at 16-25.

[5] *See* Gray v. Bell, No. 82-1838, slip op. (D.C. Cir. June 21, 1983). *Gray* reiterated the distinction between the advocatory and investigatory roles of the prosecutor. It found that the prosecutor in that case, in preparing for and presenting evidence to the grand jury, was functioning in his advocatory role and was therefore entitled to absolute immunity. Our action in this case, upholding absolute immunity for the

For a variety of reasons,[6] *Briggs I* also reached the question of witness immunity, despite the district court's refusal to certify the issue for interlocutory appeal[7] and the failure of the parties to brief it.[8] On this issue, the *Briggs I* panel held that Goodwin's statement was not the testimonial act of a witness in the traditional sense, and that the protection of absolute witness immunity should not apply.[9] The majority went on at some length to explain that even if Goodwin had been a witness, common law witness immunity might not protect government officials whose perjured testimony infringed constitutional rights.[10] The case was remanded for the district court to determine Goodwin's entitlement to a qualified immunity based upon good faith.

On remand, the district court granted summary judgment for Goodwin.[11] In the instant appeal, we reversed on the ground that factual issues remain in dispute. *Briggs II*, 698 F.2d 486 (D.C. Cir. 1983). Thereafter, the Supreme Court decided *Briscoe*: we thereupon ordered supplemental briefing and granted rehearing to reconsider the issue of witness immunity.

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prosecutor's conduct as a *witness*, does not affect the standards set out in *Gray*.

[6] Two members of the *Briggs I* panel (Judges Robinson and Wilkey) concluded that the witness immunity issue was properly before them under the "collateral order" exception to the final judgment rule of 28 U.S.C. § 1291 (1976). 569 F.2d at 58. The third member of the panel, Judge McGowan, dissented on this point. *Id.* at 26 n.14.

[7] *See* 569 F.2d at 15, 58.

[8] *Id.* at 26.

[9] *Id.* at 26-27.

[10] *Id.* at 27-29.

[11] Briggs v. Goodwin, No. 71-803, slip op. at 4 (D.D.C. Sept. 19, 1980).

Briscoe v. LaHue.

Briscoe involved a civil suit for damages under 42 U.S.C. § 1983 against a police officer who allegedly gave perjured testimony that led to the plaintiff's criminal conviction. All parties to the suit agreed that the common law affords lay witnesses absolute immunity from civil suits based on their testimony.[12] The case presented the issue of whether the same immunity applies to police and other government witnesses testifying in their official capacity.[13]

Absolute witness immunity is traditionally justified as a response to two concerns: 1) intimidation, and 2) self-censorship. Without the protection of immunity, witnesses with important information may be dissuaded from coming forward to testify because of the potential for civil liability arising out of their participation in a judicial proceeding.[14] Even after taking the stand, witnesses may be inhibited by the risk of liability from speaking freely for fear of making honest errors that might subject them to suit.[15] Absolute immunity has

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[12] 51 U.S.L.W. at 4249.

[13] Because *Briscoe* was a suit brought under 42 U.S.C. § 1983, much of the Supreme Court's opinion and of Justice Marshall's dissent concerns whether section 1983 created an exception to the general witness immunity provided by common law. *Id.* at 4248-51; *id.* at 4252-57 (Marshall, J., dissenting). That analysis is not directly applicable here, as this case involves a suit brought directly under the Constitution as recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1970). The Court did, however, separately consider and reject petitioner's argument that an exception to the general rule of witness immunity be carved out in cases of alleged perjury by police officer witnesses. 51 U.S.L.W. at 4251-52. That portion of the opinion is applicable in this case.

[14] *Briscoe*, 51 U.S.L.W. at 4249.

[15] *Id.*; *see* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 470 (1909).

therefore been justified in order that "those involved in judicial proceedings be 'given every encouragement to make a full disclosure of all pertinent information within their knowledge.' " [16]

The plaintiffs in *Briscoe*, and the dissenting opinions,[17] offered several reasons why these concerns apply with less force to government witnesses such as police officers than to lay witnesses. First, police officers have a professional interest in obtaining prosecutions that is likely to counterbalance their hesitation to testify. Second, the financial burden of defending a civil suit is less of a concern for police officers, whose defense in suits alleging constitutional violations in the performance of their jobs is ordinarily undertaken by the government. In such suits generally, police officers are entitled to qualified, not absolute, immunity. Third, "perjured testimony by police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman in uniform carries special credibility in the eyes of the jurors." [18] For this reason, cross-examination may be less effective in discrediting the perjured testimony of police officers than that of lay witnesses. Finally, the need for close cooperation between prosecutors and police officers reduces the likelihood of prosecutions for perjury, thereby undermining the sanction on which the law relies to compel immunized witnesses to speak the truth.[19]

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[16] Imbler v. Pachtman, 424 U.S. 409, 439 (quoting 1 F. HARPER & F. JAMES, THE LAW OF TORTS, § 5.22 at 424 (1956)).

[17] 51 U.S.L.W. at 4252, 4257 (Marshall, J., dissenting); *id.* at 4252 (Brennan, J., dissenting); *id.* at 4258 (Blackmun, J., dissenting).

[18] *Briscoe*, 51 U.S.L.W. at 4257 (opinion of the Court).

[19] *See* Newman, *Suing the Law Breakers*, 87 YALE L. J. 447, 449-50 (1978).

Briscoe explicitly considered these concerns and found that they did not justify excluding official witnesses from the protection of absolute witness immunity.[20] The Court said that the police officer functions like "any other witness." [21] Moreover, the Court added, without absolute immunity, the potential for litigation against official witnesses "might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." [22] Thus, the Court held that the public interest in "protecting the judicial process," [23] which had justified affording judges, prosecutors and lay witnesses the protection of absolute immunity, also justified granting that protection to police officers when they take the witness stand.

II

In *Briggs I*, this court denied Goodwin witness immunity because his testimonial act differed from that of a witness in the usual sense. The court found that Goodwin's brief statement on the stand "was prompted by, and directly incidental to" his involvement in managing and administering an investigaton.[24] "To the extent that [Goodwin's] one word answer is viewed as a testimonial act, it was one occasioned by, and critical to, appellant's discharge of that responsibility." [25]

We find it difficult to distinguish Goodwin's testimonial act from those of police officers in situations falling within the rationale of *Briscoe*. Testimony by a police

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[20] 51 U.S.L.W. at 4251.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 4249 (quoting Imbler V. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring in the judgment)).

[24] 569 F.2d at 26.

[25] *Id.* at 27.

officer will very often involve challenges to his conduct while performing investigatory tasks. A police officer who has been integrally involved in an investigation that culminates in a criminal prosecution has a clear interest in the outcome of the trial. In such a situation, the police officer has professional and personal interests in his testimony that are closely analogous to Goodwin's interest in the testimony out of which this suit arises. *Briggs I* explicitly found Goodwin to be operating not as a prosecutor but as an investigator.[26] We decided that in that role his immunity should resemble that of a police officer involved in an investigation. *Briscoe* informs us that that immunity is absolute for statements made on a witness stand. *Briscoe* therefore compels the conclusion that when Goodwin made his sworn statement from the witness stand,[27] he enjoyed absolute immunity.

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[26] *Id.* at 16-25 ("[W]e rely on a series of federal decisions distinguishing between a prosecutor's role as advocate, on the one hand, and his function as an administrative or investigative officer, on the other." *Id.* at 16.).

[27] In *Briggs I*, the court did not consider of great significance the fact that Goodwin made his statement under oath from the witness stand:

> Had [Goodwin] volunteered to represent as an officer of the court that no informers were involved, and had the parties beeen content with that, there would be no issue as to witness immunity worthy of the name. The difference between the falsity of such a nontestimonial representation, on the one hand, and the technical consequence of perjury attached to a statement under oath, on the other, is not at the heart of the immunity issue in this appeal.

569 F.2d at 26. Fuller briefing on this issue indicates that the fact of Goodwin's oath was indeed significant to the credibility given his statement by those who relied on it. The full transcript makes clear that Goodwin offered to make an unsworn representation in response to the court's inquiry, but witnesses' counsel insisted that such a representation was "not competent proof in any court of law and that under these circumstances Mr. Goodwin ought to submit an affidavit *under*

The fact that *Briscoe* involved statements at a trial whereas this case involves statements at a hearing on a motion during the grand jury phase of an investigation is not a distinction that allows a different result. *Briscoe* emphasized the concern that the absence of immunity would interfere with the ability of "judicial proceedings" [28] "to determine where the truth lies." [29] That concern applies not only to trials, but to any judicial proceeding where the testimony of witnesses might be affected by the lack of immunity.[30] Thus, the rationale of *Briscoe* applies with equal force whenever a witness testifies in a judicial proceeding the function of which is to ascertain factual information.

In addition to causing reconsideration of Goodwin's witness status, *Briscoe* rejected the reasons offered in *Briggs I* for why absolute witness immunity might not apply to government officers in suits alleging constitu-

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oath . . ." (July 13, Tr. pp. 64-65, Joint Appendix (J.A.) 629-30). It was in response to this objection that the court ordered Goodwin to take the stand, be sworn and testify. Moreover, testimony at appellant's criminal trial, and depositions and interrogatories suggest the importance of the fact that Goodwin's statement was under oath. *See, e.g.*, Answer of Jack Jennings to Goodwin's Interrogatory No. 11, J.A. 530; Answer of Scott Camil to Goodwin's Interrogatory No. 11, J.A. 519; Answer of John Briggs to Goodwin's Interrogatory No. 11, J.A. 517; Deposition of Peter P. Mahoney, September 4, 1979, p. 128, J.A. 497; Answer of William Patterson to Goodwin's Interrogatory No. 10, J.A. 511b.

[28] 51 U.S.L.W. at 4249 (quoting Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring in the judgment)).

[29] 51 U.S.L.W. at 4249 (quoting Imbler v. Pachtman, 424 U.S. 409, 440 (1976) (White, J., concurring in the judgment)).

[30] *See supra* pp. 5-6.

tional violations.[31] *Briggs I* explicitly noted that "[p]olicy considerations counselling the insulation of *private citizens* from civil liability arising from their performance as witnesses do not apply with equal force when a complaint charges that constitutional rights have been violated by a *public employee* operating from the witness stand . . . . The unique importance of constitutional rights hardly needs restatement . . . . [I]t can be asserted with both reason and authority that absolute immunity is not to be extended to the constitutional tort context absent the most compelling justification." [32] The Supreme Court apparently found that neither the public employee status of the witness, nor the constitutional character of the alleged violation constituted such a compelling justification.[33]

III

In granting absolute immunity to public officials acting as witnesses, the Supreme Court recognized that "the alternative of limiting the official's immunity would disserve the broader public interest." [34] "In this instance it

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[31] The Court cited *Briggs I* as evidence of a split in the circuits on the immunity question, which supplied a reason for granting certiorari. 51 U.S.L.W. at 4248 n.4.

[32] 569 F.2d at 28.

[33] *Briscoe* involved a suit under 42 U.S.C. § 1983, whereas the instant case arises directly under the Constitution. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Supreme Court has noted, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978); *see also* Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 n.30 (1982).

[34] *Briscoe*, 51 U.S.L.W. at 4252.

has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." [35] As a lower court, we are bound by the balance struck.[36] We therefore vacate our prior opinion and affirm the judgment of the district court granting summary judgment for Goodwin.

So ordered.

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[35] *Id.* at 4252 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

[36] While upholding appellee's absolute immunity claim, we note our deep concern. The allegations in this case painfully illustrate the significant costs of this holding—not only to the appellant, but to the integrity of our criminal justice system as well. As the state's lawyer and an officer of the court, a prosecutor has a special obligation to discharge his duties lawfully and fairly. In this case, appellant claims that a prosecutor perjured himself from the witness stand during a criminal investigation. Our response to appellant's claim is that a civil damages action, whatever its merits, may not be pursued against the prosecutor. Instead, appellant must rely on the possibility of a prosecution of the prosecutor by his fellow prosecutors. We find it troubling that our system of justice, which rests so fundamentally on the consent of the governed, offers such inadequate remedies for official violations of individuals' constitutional rights.

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MACKINNON, *Senior Circuit Judge* (concurring in the judgment): I am not in disagreement with much of the analysis and statements in Judge Bazelon's present opinion, but I believe some of the facts are more favorable to Goodwin than the opinion recognizes, and I prefer to make several comments and rest my concurrence in the result on the following grounds. First, I continue to adhere to the views expressed in my dissent from the panel's original decision in *Briggs v. Goodwin II*, 698 F.2d 486, 497-98 (D.C. Cir. 1983). Second, it is my view that Goodwin has a valid factual defense in that he had given orders that government informants be excluded from the class of potential defendants represented by defense counsel and was justified in assuming that his orders had been carried out. Third, in addition to my opinion that Goodwin enjoys immunity as a witness, I am also of the opinion that he possesses complete immunity as a prosecutor, since I generally agree with the opinions expressed in Judge Wilkey's dissent in *Briggs v. Goodwin I*, 569 F.2d 10, 29-61 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

I must also voice my disagreement with the view expressed in footnote 36 of the majority opinion. That view fails to acknowledge a basic principle of law that has been recognized as fundamental to American jurisprudence for over a hundred years: that those who participate in public litigation and who perform certain governmental functions are not to be subjected thereby to harassing civil litigation. This principle has been consistently applied to judges, prosecutors, legislators and presidents, as well as to witnesses. The law of immunity and its compelling justifications have been expounded by some of the greatest jurists in our nation's history. *See, e.g., Bradley v. Fisher*, 13 Wall. 337, 351 (1872) (Field, J.) ("[J]udges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."); *Pierson v. Ray*, 386 U.S.

547, 554 (1967) (Warren, C.J.) ("This immunity 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.'") (quoting *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)); *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959) (Harlan, J.) ("The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government."); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (L. Hand, J.) ("The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute . . . .") (quoted in *Nixon v. Fitzgerald*, —— U.S. ——, ——, 102 S. Ct. 2690, —— n.32 (1982)). My final objection to the personal comments in footnote 36 is that they are extrajudicial and serve no worthwhile purpose, as the Supreme Court has spoken.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2269

JOHN BRIGGS, ET AL., APPELLANTS

v.

GUY GOODWIN, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 74-00803)

Argued October 26, 1981

Decided January 11, 1983

Nancy Stearns with whom *Morton Stavis*, *Doris Peterson*, *Philip J. Hirschkop* and *Jack Levine* were on the brief, for appellants.

Robert F. Muse with whom *Jacob A. Stein* was on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: MACKINNON and GINSBURG, *Circuit Judges* and BAZELON, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

BAZELON, *Senior Circuit Judge*: This civil suit arises out of criminal proceedings brought against appellants in 1972. Appellants[1] allege that Charles Goodwin, an attorney with the Department of Justice, misrepresented to them in open court that one of their comrades was not a government informant. They claim that this misrepresentation, which Goodwin left uncorrected, violated their Sixth Amendment right to the effective assistance of counsel because it led them to share various aspects of their defense with the informant. They seek both compensatory and punitive damages in a "*Bivens*-type" cause of action arising directly under the Constitution.

The district court granted summary judgment in favor of appellee, holding that he made his representation in good faith. We do not agree with the district court's conclusion that the good faith of the appellee presents no genuine issue as to any material fact. Nor can we accept the other grounds offered by appellee in support of affirmance; namely, that appellants' acquittal in their criminal trial negates any claim of a Sixth Amendment violation, and that appellants have not stated a valid cause of action within the contemplation of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1970).

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[1] There are twelve appellants in this action. Some of their claims are factually distinct. Neither side, however, relies on these distinctions at this stage in the proceedings. We, therefore, do not consider the importance of such differences. As a result, any reference hereafter to "appellants" or "plaintiffs" may or may not encompass all of the appellants. Further, we leave to the district court the application of this decision to individual appellants.

I. BACKGROUND

These are the facts read favorably for the appellants.[2]

On July 7, 1972, a grand jury in Tallahassee, Florida, subpoenaed appellants to testify concerning their activities in connection with the Vietnam Veterans Against the War (VVAW). The subpoenas were returnable 3 days later on July 10, 1972.[3] A group of lawyers hastily assembled to represent the subpoenaed witnesses. Because of the extreme time pressure involved the lawyers counselled many of the potential witnesses on a group basis.

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[2] While courts should be vigilant to dispose of non-meritorious claims at the pretrial stage, *see* Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4817 (U.S. June 24, 1982); Butz v. Economou, 438 U.S. 478, 507-08 (1978), the rules governing summary judgment in cases involving officials claiming a qualified immunity do not differ from those applicable in other contexts. *See* Halperin v. Kissinger, 606 F.2d 1192, 1209 (D.C.Cir. 1979); Apton v. Wilson, 506 F.2d 83, 94-95 (D.C.Cir. 1974). *But see* Halperin v. Kissinger, 606 F.2d at 1214 (Gesell, J., concurring).

Summary judgment is to be granted only if there are no material facts at issue and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. This does not mean that summary judgment may be opposed by mere protestations that the facts are different or in dispute. Fed. R. Civ. P. 56(e); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90 (1968). Instead, the party opposing summary judgment generally must present affidavits, depositions, answers to interrogatories, or admissions which set forth the disputed facts in such a form as would be admissible as evidence. *Id.*

[3] July 10, 1972, was the first day of the Democratic National Convention in Miami Beach, Florida. Appellants had parade permits for a protest march at the Convention on that day. They could not use these permits because of the appellants' compelled attendance at the grand jury. In an earlier case, appellants' claim was rejected that the timing of the subpoenas and the grand jury proceedings violated their First Amendment rights. Beverly v. United States, 468 F.2d 732, 747-49 (5th Cir. 1972).

Unknown to either the appellants or their lawyers, one of those subpoenaed, Emerson Poe, was a paid undercover FBI informant. The grand jury subpoenaed him in order to keep secret his status as an informant. Despite this status, Poe attended a group meeting of the plaintiffs and their lawyers on July 8, 1972, in preparation for the grand jury. He also signed a retainer form with appellants' attorneys, though the scope of that retainer is unclear. Throughout the grand jury proceedings, Poe consulted with appellants' lawyers and was present in the cramped hallway where the appellants also consulted with their lawyers.[4]

Recurring rumors of police and FBI infiltration of VVAW prompted concern among the appellants that informants might be in their midst. Group counsel filed a motion with the district court to discover whether any of the witnesses represented by them were government informants. To clarify that motion, the district court requested that counsel list the witnesses in question and their respective attorneys. On July 12, that list was presented orally on the record before the court. Emerson Poe was among the names listed. During discussion of the motion the next day, the court peremptorily directed Goodwin to take the stand and be sworn. He was asked one question:

> THE COURT: Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?
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> THE WITNESS [GUY GOODWIN]: No, Your Honor.

Goodwin knew at the time that Poe was an FBI informant. He also had the opportunity to see Poe among the plaintiffs and their attorneys as they waited in the

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[4] The grand jury asked Poe only his name and address. Several other subpoenaed witnesses also received only cursory examination.

hall outside of the grand jury room. On the other hand, Goodwin claims to have issued instructions that Poe was not to become involved with the appellants' defense efforts or their attorneys. In addition, the record reveals possible confusion over whether or not Poe was one of the witnesses covered by the judge's question.[5]

Later that day, the grand jury indicted six of the appellants on federal criminal charges relating to an alleged conspiracy to cross state lines to instigate a riot.[6] Two other appellants were subsequently indicted on the same charges. The grand jury granted the remaining four appellants immunity; when they refused to testify, they were convicted of contempt.[7] Poe was not indicted on any charge.

Shortly after the grand jury proceeding, Poe, at the behest of the FBI, retained a local lawyer to inform appellants' attorneys that he would be representing Poe in any further proceedings. Nonetheless, the appellants continued to take Poe into their confidence and discuss aspects of the upcoming trial with him. Poe attended a number of meetings among appellants at which they discussed defense matters. Appellants' attorneys were sometimes present. On at least one occasion, appellants questioned Poe's presence at these meetings because he was not an actual defendant.

Despite renewed instructions scrupulously to avoid "invading" the defense camp, Poe reported to the FBI regarding his attendance at meetings, his other involvement with the appellants, and the information he ac-

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[5] J.A. at 604-610.

[6] For a complete enumeration of the charges, *see* Beverly v. United States, 468 F.2d at 732, 757 n.9.

[7] These convictions were subsequently overturned on unrelated grounds. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

quired. The FBI routinely passed such information on to the Justice Department. Among the information that Poe provided the FBI was information concerning the severe financial impact of a pending motion on the defense team; the intention of one of the appellants to visit a potential witness for the government; friction among members of the defense team; and a jury-selection survey being conducted by the defense. Poe agreed to help appellants collect information for the survey, but he failed to do so or reported false information.

On August 17, 1973, pursuant to the Jencks Act,[8] appellants obtained written materials revealing Poe's informant status. At a pretrial hearing in their criminal prosecution, the indicted appellants succeeded in suppressing certain evidence discovered by Poe and turned over to the FBI.[9] The court held that the means used to gather the evidence violated the Sixth Amendment.[10] At trial, the jury acquitted plaintiffs of all charges.

Appellants brought this action alleging that Goodwin violated their Sixth Amendment rights both directly through his misleading statement on witness informants and indirectly through his failure to remedy the situation when it became apparent that Poe was gathering confidential defense information and reporting it to the FBI.[11] Goodwin moved for dismissal of the complaint,

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[8] 18 U.S.C. § 3500 (1976).

[9] United States v. Briggs, No. 73-1353, Tr. at 281-82; J.A. at 680-81 (N.D. Fla. Aug. 17, 1973).

[10] The court found the means used for obtaining the evidence inconsistent with the mandate of Massiah v. United States, 377 U.S. 201 (1964) (surreptitious interrogation of criminal defendants violates Sixth Amendment). *See also* United States v. Henry, 447 U.S. 264 (1980) (admission of evidence gathered by government informant planted in jail violates sixth amendment).

[11] Plaintiffs initially also sued two other attorneys for the United States, William Stafford and Stuart Carrouth, and an

arguing that as a public prosecutor he was entitled to absolute immunity from private damage suits for actions taken in his official capacity. He also claimed that his statement was made while a "witness" in court, and that he should be entitled to absolute witness immunity. Both the district court and a panel of this court denied a motion to dismiss on either of these immunity grounds.[12] Instead, we determined that Goodwin was only entitled to a qualified immunity; he would be protected from private suit only if his actions were taken in good faith.[13]

On remand, Goodwin moved for summary judgment. The district court rejected a renewed claim of absolute immunity, but granted summary judgment on a finding that Goodwin had established his good faith because he "in fact believed in the veracity of his statement" concerning informants represented by common counsel.[14] In this appeal, appellants contend that material issues of fact remain in dispute. Goodwin disagrees and offers several other grounds for affirming summary judgment.

FBI agent, Claude Meadow, who were involved in the investigation, indictment and criminal trial. The complaints against Stuart, Carrouth, and Meadow were dismissed for improper venue. Stafford v. Briggs, 444 U.S. 527 (1980).

[12] Briggs v. Goodwin, 384 F. Supp. 1228, 1230 (D.D.C. 1974); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) [hereinafter referred to as *Briggs I*]. That case was heard on interlocutory appeal under 28 U.S.C. § 1292(b) (1976). While only the issue of prosecutorial immunity was certified for appeal in *Briggs I*, the opinion reached the issue of witness immunity in the interest of judicial economy. 569 F.2d at 25-28; *see also id.* at 26 n.14 (dissenting from view that witness immunity issue was properly before the court).

[13] Briggs v. Goodwin, 569 F.2d at 16, 25.

[14] Briggs v. Goodwin, No. 74-803, slip op. at 4 (D.D.C. Sept. 19, 1980).

II. Discussion

A. *The Grant of Summary Judgment*

In granting summary judgment, the district judge relied heavily on the deposition testimony of Goodwin, Poe, and other government officers associated with the case. That evidence supports Goodwin's claim that he instructed Poe not to join in the appellants' defense. It also suggests that Goodwin believed that Poe was not included in the class of persons whom he stated were not government informants. Appellants contend that this evidence does not settle all disputes over material facts. We agree.

In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court described the qualified immunity as follows: "It is the reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity." *Id.* at 247-48. The test is an objective one, *see Harlow v. Fitzgerald*, 50 U.S.L.W. 4815, 4820 (U.S. June 24, 1982), focusing on whether the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate[] constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In the instant case, appellants contend that Goodwin knew that his statement was false or misleading, and that even if he believed the truth of his statement, such a belief was unreasonable. They further contend that in light of Poe's continuing reports to the FBI on defense plans and concerns, Goodwin unreasonably failed, after July 13, to correct or clarify his sworn statement.

Judges and juries have specialized functions in cases in which negligence (what appellee should have shown) or state of mind (what appellee actually knew) is in is-

sue.[15] Our judicial system relies on the competence of juries to apply standards of reasonableness to particular fact situations and to make determinations of the state of mind of parties in light of the circumstances surrounding an action. Summary judgment should be granted on such issues only when they are so clear that a judge can decide them as a matter of law. This degree of clarity is not present here.

There is, for example, some conflict between the depositions of Goodwin and FBI agent Pence. Pence maintains that prior to July 13, he told Goodwin that informant Poe had received instructions to consult with the defense attorneys for the VVAW members on the same basis as the other witnesses (Pence Dep. 25-6, J.A. pp. 229-30). Goodwin maintains that he did not learn of these instructions until after he made his statement (Goodwin Dep. p. 54, J.A. p. 204). Both depositions agree that Goodwin objected to those instructions. According to the Pence version, however, a jury might conclude that Goodwin had reason to suspect that Poe was not obeying earlier instructions to avoid getting involved in the defense of the other witnesses. A jury could find this discrepancy important in determining whether Goodwin actually believed the truth of his statement and whether such a belief was reasonable.

More important, however, the district court granted summary judgment based entirely on appellee's good faith belief at the time of making his statement on July 13. This view of good faith is too narrow. If, at some time after making his statement before the court, Goodwin knew or reasonably should have known that it was either false or had been misleading, he had an obli-

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[15] *See* 10. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2729, 2730 (1973).

gation to correct or clarify his statement for those that it had misled.[16]

In defining the requirements of good faith this way, we find instructive the principles of the common law governing torts such as misrepresentation and deceit. Those principles impose a duty on an individual who makes a statement to clarify that statement to those justifiably relying on it if he later learns that his original statement was false or misleading.[17] Such a duty can arise even though the statement is literally true if it is ambiguous enough to be misinterpreted. The test is the effect that the statement would have "on the ordinary mind."[18] These common law tort principles do not control constitu-

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[16] In *Briggs I* we held that Goodwin's "protection from liability depends upon a showing that he entertained a good-faith, reasonable belief in the truth of his response to the federal district judge in Florida." Briggs v. Goodwin, 569 F.2d at 16. Thereafter, in granting summary judgment, it appears that the district court interpreted this language too narrowly. Our earlier opinion concerned only Goodwin's claim of absolute immunity regarding his statement on July 13. In rejecting that claim, the precise contours of the qualified immunity were not an issue before the court, and were not part of our *ratio decidendi*. That opinion was not, nor was it intended to be, an exhaustive description of the good faith immunity. Nothing in that opinion conflicts with or precludes the requirement of good faith that we describe today. Nor is this opinion a definitive work on good faith immunity; additional refinements may become necessary as the facts in this case develop. Based on the allegations and the facts as developed thus far, we find merely that the appellants' right to rely on Goodwin's statement imposed the duty on him to clarify or correct his statement as described above.

[17] *See* PROSSER, LAW OF TORTS § 106 at 695-97 (1977). *Cf. also* RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1977) (liability for nondisclosure in business transactions); Monroe v. Pape, 365 U.S. 167, 187 (1961) (incorporating tort rule that imposes liability "for the natural consequences of [a defendant's] actions").

[18] *See* PROSSER, LAW OF TORTS § 106 at 695 (1977).

tional torts because such actions are governed by federal common law.[19] But traditional common law torts do provide a background from which to draw analogies,[20] and we find them relevant in this situation.

In the instant case, appellants clearly had a right to rely on Goodwin's statement—it was a statement under oath made specifically for their benefit. It also appears that the appellants would not have trusted Poe but for their belief that he was not an informant. For the purposes of summary judgment, we can also assume that this belief was based on Goodwin's representation to the district court. Goodwin's representation and his failure to correct any misimpression that he may have created may thus have occasioned the Sixth Amendment violation and consequent injury appellants assert. If Goodwin knew or should reasonably have foreseen that his statement had misled appellants in the manner they allege,

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[19] *See* Carlson v. Green, 446 U.S. 14, 23 (1980); Burks v. Lasker, 441 U.S. 471, 476 (1979).

[20] Federal courts have frequently used the common law background of torts to fill in gaps in the development of constitutional torts. In Monroe v. Pape, 365 U.S. 167 (1961), the Court referred to "the background of tort liability" against which section 1979 should be interpreted. *Id.* at 187. In Pierson v. Ray, 386 U.S. 547 (1967), the Court relied on this reference, along with general common-law sources such as treatises and state law cases, to extend the common-law defenses of good faith and probable cause to Jackson, Mississippi, police officers sued for unconstitutional arrests. *Id.* at 555-57. In other situations, courts have relied on the common law to provide guidance in establishing constitutional tort principles concerning issues such as the defendants' state of mind, *see generally* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977), causation, and the magnitude of injury necessary to accord compensation. *See* Carey v. Piphus, 435 U.S. 247, 255-56 & nn. 7, 9 (1978) (citing tort treatises to support the causation requirement imposed upon plaintiff); *see* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 14-21 (1980).

his failure to apprise appellants and the court of the full truth about Poe would preclude successful invocation of a good faith immunity defense. Thus, the facts necessary to grant appellee summary judgment have not been established and we must reverse the decision of the district court.

Appellee, however, offers alternative bases on which he contends summary judgment should be affirmed. When reviewing a grant of summary judgment, it is within the proper discretion of an appellate court to affirm on a basis other than that relied upon by the district court. After careful consideration of the arguments put forth by appellee, we reject them all. But because the law of constitutional torts and of the Sixth Amendment are both experiencing rapid growth and considerable confusion, the legal theories advanced by the appellee merit discussion.

B. *Sixth Amendment Violations*

In *Weatherford v. Bursey*,[21] the Supreme Court held that a threat of significant harm to the defendant was a necessary component of a nondeliberate violation of the Sixth Amendment.[22] Mere attendance by an undercover agent at a meeting with the criminal defendant and his attorney does not constitute a Sixth Amendment violation

[21] 429 U.S. 545 (1977).

[22] A deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment. United States v. Morrison, 602 F.2d 529, 531-32 (3d Cir. 1979), *rev'd on other grounds*, 449 U.S. 361 (1981); *cf.* Weatherford v. Bursey, 429 U.S. at 557, 558 (noting lack of purposeful state intrusion); Klein v. Smith, 559 F.2d 189, 197-200 (2d Cir. 1977) (discussing but not deciding whether intentional intrusion constitutes a *per se* violation). *But see* United States v. Glover, 596 F.2d 857, 863-64 & n.10 (9th Cir. 1979).

as long as the agent communicates nothing of what he learns to his superiors and does not testify as to the content of the conversation.[23] In the instant case, appellee

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[23] 429 U.S. at 554.

Judge MacKinnon's reliance on *Weatherford* to require a dismissal of this case is unwarranted. *Weatherford* involved a meeting between a lawyer and his client in the presence of a government informant. The informant attended the meeting at the client's request in order to avoid raising suspicions concerning his informant status. He did *not* provide the prosecution with any information concerning the client's defense. The Court explicitly relied on that fact to hold that no Sixth Amendment violation had occurred, *id.* at 556, and added that "had the prosecution learned from [the agent] the details of the [lawyer-client] conversations, [the respondent] would have a much stronger case." *Id.* at 554. In the instant case, appellants have demonstrated that the informant may have passed information concerning their case to the prosecution. Thus, this case presents a question that *Weatherford* explicitly left unanswered and described as a "much stronger" claim.

The dissent maintains that this distinction of *Weatherford* is contradicted by the record. Specifically, Judge MacKinnon relies on the district court's finding that "Goodwin was not privy to [defense strategy] information when he made his assertion to Judge Middlebrooks." This finding, however, relates only to Goodwin's knowledge *at the time* of his statement before the grand jury. Sixth Amendment protections are implicated whenever the prosecution improperly obtains defense strategy information in a criminal proceeding. Appellants have pointed to circumstances suggesting that *after* Goodwin's statement before the grand jury, Poe obtained such information and passed it on to the FBI, which forwarded it to Goodwin. (Appellant's Brief at 20-23; Pence Dep. pp. 11-14) Interpreting those circumstances as we must on summary judgment, this case is clearly not appropriate for dismissal under *Weatherford.*

Finally, Judge MacKinnon is factually incorrect in asserting that the record "does not contain a shred of specific evidence that Goodwin *actually* received" the information sent by the FBI to the Justice Department. Deposition testimony by FBI agent Pence, who supervised FBI activities in this case, states explicitly that his contact at the Justice Depart-

relies on the fact that appellants were all acquitted, and contends that therefore no violation of the Sixth Amendment occurred.[24]

The threat of significant harm required by *Weatherford* does not, however, have to amount to "prejudice" in the sense of altering the actual outcome of the trial.[25] Although the Sixth Amendment is concerned primarily with fairness at trial, it is not limited to that function.[26]

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ment, to whom he sent all information, was appellee Goodwin. Pence Dep. at 12-14, 40-41, J.A. at 224-26, 232-33. Moreover, even in the absence of this specific evidence, Judge MacKinnon's assertion once again ignores that on summary judgment all inferences are to be drawn in favor of the appellant. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Where information bearing on a pending case is sent to the Justice Department, it is hardly a great leap of faith to infer that it "actually" reached the prosecutors in the case.

[24] In a slightly different argument, appellee contends that because of appellants' acquittal on criminal charges, appellants can show no damages or cannot prove the actual amount of any damages they suffered even if a Sixth Amendment violation occurred. We agree that the injuries allegedly suffered by appellants may be intangible and elusive. We also agree that appellants may have a difficult time proving actual "damages" in the tort sense, and that such proof is necessary for them to recover a compensatory award. Carey v. Piphus, 435 U.S. 247, 257-65 (1978). Nevertheless, they should be given an opportunity to do so. Moreover, a cause of action arising from the violation of the appellants' constitutional rights is "actionable for nominal damages without proof of actual injury." *Id.* at 266; *see also* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[25] *Cf.* United States v. Morrison, 449 U.S. 361, 367 (1981) (implying possible civil damage action when Sixth Amendment violation does not alter overall fairness of criminal trial).

[26] *See* Miranda v. Arizona, 384 U.S. 436, 465-66 (1966) (counsel ensures fair treatment by government officials); Escobedo v. Illinois, 378 U.S. 478, 486-87 (1964) (same); United States v. Valencia, 541 F.2d 618, 622 (6th Cir. 1976); Fitzgerald v. Estelle, 505 F.2d 1334, 1337-38 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975).

The right to counsel protects the whole range of the accused's interests implicated by a criminal prosecution. These interests may extend beyond the wish for exoneration to include, for example, the possibilities of a lesser charge, a lighter sentence, or the alleviation of "the practical burdens of a trial." [27]

In *Weatherford*, the intrusion imposed no additional effort or burden on the defense, as the informant did not turn over any evidence to the prosecution. In the instant case, the evidence gathered by Poe could have been used against the appellants if they had not challenged it. Moreover, the appellants need not prove that the prosecution actually used the information obtained. The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental, . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice." [28] Further, once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive.[29]

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[27] United States v. Brady, 397 U.S. 742, 751-52 (1970); *see also* Tollett v. Henderson, 411 U.S. 258, 267-68 (1973).

[28] Weatherford v. Bursey, 429 U.S. at 556.

[29] *See* United States v. Morrison, 602 F.2d 529, 536 (3d Cir.), *rev'd on other grounds*, 449 U.S. 361 (1980); *see also*

Appellants contend that Poe's continued status after their indictment as both a secret FBI informant and as their confidant obstructed their counsel's efforts to gain expeditious and economical dismissal of the criminal charges they faced. FBI documents show that Poe informed the FBI of the appellants' efforts to contact a potential witness; the financial difficulties of the defense team, particularly regarding the adverse financial impact of a particular venue motion; and the existence of a jury selection survey.[30] Moreover, there is evidence that the FBI routinely passed information received from Poe to the Department of Justice and attorneys involved in this case.[31] Such information would undoubtedly have been of interest to a prosecuting team planning its strategy. Thus, the record suggests a realistic possibility that ap-

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United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978); *cf.* United States v. Natale, 494 F. Supp. 1114, 1124-25 (E.D. Pa. 1979) (detailed "chinese wall" procedures prevented prosecuting team from obtaining prohibited information from investigators). The government is, of course, free to rebut this presumption, by showing, for example, procedures in place to prevent such intragovernmental communications.

[30] Joint Appendix at 84-85, 118-19, 126. Goodwin's reliance on United States v. Kilrain, 566 F.2d 979 (5th Cir. 1978), and Klein v. Smith, 559 F.2d 189 (2d Cir. 1977), is therefore misplaced. In both those cases there were *factual* findings by the trial court that *no* strategy information was passed onto the government.

[31] Joint Appendix at 222-26, 232-33. We are not without solicitude for the government's dilemma. The government may have legitimate reasons, such as maintaining an individual's cover or continuing an ongoing investigation, to keep an informant in a position where he or she necessarily receives a continuous flow of information thought by the defense to be confidential strategy. The proper course, however, is not for courts to excuse government intrusion in these circumstances, but for the government to ensure that no harm to the defendant's cause—and thus no Sixth Amendment violation—flows from the intrusion. *See* pp. 12-13.

pellants suffered injury as a result of governmental intrusions in violation of the Sixth Amendment.

C. *The Appropriateness of a Bivens-Type Action*

When this case was before this court on interlocutory appeal concerning appellee's claim of immunity, we confined our decision to the narrow question of immunity that was before us.[32] In so doing, we explicitly avoided the question of when and whether *Bivens* establishes a cause of action for violations of the Sixth Amendment, as distinct from Fourth Amendment violations which were at issue in *Bivens*. Such caution was warranted because the scope of the *Bivens* cause of action had produced sharp conflict among the circuits.[33]

We find it conceptually awkward to continue our avoidance of that issue in the present posture of this case. Appellee contends that we should affirm summary

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[32] Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977).

[33] Several Courts had apparently concluded that *Bivens* established a cause of action for damages arising from the violation of any constitutional right by a federal official. *See, e.g.*, Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Gardels v. Murphy, 377 F.Supp. 1389 (N.D.Ill. 1974); and Butler v. United States, 365 F. Supp. 1035 (D.Haw. 1973). Other courts had read the leading case more narrowly, restricting its sway to Fourth Amendment transgressions like that actually treated by the Supreme Court in *Bivens*. *See, e.g.*, Moore v. Schlesinger, 384 F.Supp. 163, 165 (D.Colo. 1974), *aff'd by unpub. opinion* (10th Cir. Nov. 21, 1975), *cert. denied*, 425 U.S. 953 (1976); and Davidson v. Kane, 337 F.Supp. 922, 924 (E.D.Va. 1972). Several tribunals had noted the issue, but reserved decision. *See, e.g.*, Holodnak v. Avco Corp., 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975), and Wahba v. New York University, 492 F.2d 96, 103-04 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

judgment because appellants have failed to state a valid cause of action under *Bivens*. A decision on that issue seems necessary prior to a decision on whether an individual enjoys an immunity to that cause of action. Moreover, in the few years since our last opinion in this case, several Supreme Court opinions have provided some clarity in this area. As a consequence, the need to proceed with such caution has diminished.

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court upheld a cause of action brought by a woman against a Congressman who allegedly engaged in sex discrimination in a staff employment decision. By relying on *Bivens*, despite the fact that the right asserted was protected by the Fifth Amendment, the Court made clear that the *Bivens* holding was not limited to violations of the Fourth Amendment. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court expanded the law created by *Bivens* and *Davis* still further. A mother sued for damages allegedly caused by federal prison officials' violation of her deceased son's constitutional rights protected by the Eighth Amendment. The Court held that a tort remedy was "available directly under the Constitution," even though the allegations could also support a suit under the Federal Tort Claims Act. That holding made clear that a *Bivens*-type suit can exist even where other remedies are available. The Court interpreted the *Bivens* holding in a sweeping manner:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S., at 396; *Davis v. Passman*, 442 U.S. 228, 245 (1979). The second is when defendants show that Congress has provided

> an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, *supra*, at 397; *Davis v. Passman*, *supra* at 245-247.

446 U.S. at 18-19 (emphasis in original).

By saying that the cause of action may be defeated "in two situations," the Court implied that it may not be defeated in other situations. Appellee in this case has not, thus far, demonstrated that either of these situations obtains in the instant case. He has not shown an alternate remedy that Congress has explicitly labelled as a susbtitute for a *Bivens* action. Nor has appellee identified "special factors counselling hesitation." Appellee contends that, as prosecutor, he needs absolute immunity from such cases, but this claim was fully considered by this court before. In that decision, we determined that the requirements of Goodwin's job justified only a qualified immunity, an immunity that depended on the good faith of his actions.

Thus, we see no apparent reason why the Sixth Amendment rights in this case ought to be treated differently from the Fourth Amendment rights at issue in *Bivens*, the Fifth Amendment rights at issue in *Davis v. Passman*, or the Eighth Amendment rights at issue in *Carlson v. Green*. In addition, the damage remedy provided by a *Bivens*-type suit is appropriate in this context. Damages are a traditional remedy for unwarranted harm resulting from the judicial process; the *Bivens*-type action involved here is analogous to tort actions for false imprisonment, malicious prosecution, and abuse of process. Moreover, alternative remedies are often unavailable for violation of Sixth Amendment rights. An exclusionary rule may provide prospective relief in some cases, but does not offer any compensatory relief. Appellate review of convictions provides no relief for those who would have been convicted in spite of the Sixth Amendment violation, for those who are acquitted, and for those

who are never even taken to trial but who are nonetheless dragged through the early stages of the criminal process. The vindication of Sixth Amendment rights to the effective assistance of counsel for such persons will depend solely on the availability of a damage remedy. For such persons "the 'exclusionary rule' is simply irrelevant[;] [f]or people in [their] shoes, it is damages or nothing." [34]

Conclusion

We have only examined the record to see if appellants have raised material disputes over factual or inferential issues. We have concluded, contrary to the district court, that the appellants have pointed to evidence that establishes a genuine contest on the issue of appellee's good faith. We also cannot find any other basis on which to affirm summary judgment. Appellants have demonstrated a possible Sixth Amendment violation and the possible liability of Goodwin. They should be allowed to proceed to trial.

Reversed and remanded for further proceedings consistent with this opinion.

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[34] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

MACKINNON, *Circuit Judge* (dissenting). In my opinion the summary judgment of the district court should be affirmed. For reasons set forth in Judge Wilkey's dissent in *Briggs I* (*Briggs v. Goodwin*), 569 F.2d 10, 46-61 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), I would rule that Goodwin was entitled to complete immunity as a witness. Moreover, appellants' claims should be dismissed under *Weatherford v. Bursey*, 429 U.S. 545 (1977)[1] (an undercover agent's knowledge of defense

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[1] The attempt of the majority in its footnote 23 to distinguish *Weatherford* is contradicted by the record. It rests on the unsubstantiated assumption that information on defense strategies passed to the FBI, and thence "routinely" to the Justice Department, *see* majority op. at 4, *necessarily* made its way to *Goodwin* himself. But the Department of Justice is a very large organization and the trial court specifically found that

> the evidence supporting plaintiffs' assertion that Poe was cognizant of some defense strategy also indicates that *Goodwin was not privy to this information when he made his assertion to Judge Middlebrooks.* Finally, *the assertions of defense counsel on July 12th indicating that Poe was not being represented supported Goodwin's belief that Poe was in fact not represented by counsel.* [JA 605.] It is clear that Goodwin did not perjure himself on July 13, 1972.

(JA 5) (emphasis added).

Since the suit against Goodwin turns on allegations that *he* was privy to the information when testifying, summary judgment was appropriate because there was no showing that a genuine issue of material fact remained as to whether appellants' Sixth Amendment rights had been violated by that testimony.

As for the claim that appellants' Sixth Amendment rights were violated by Goodwin's failure to advise them of subsequent information allegedly received concerning informants, the record does not contain a shred of specific evidence that Goodwin *actually* received such information. If the prosecutor did not receive such information, the defendants were not harmed. The majority refers, however, to the deposition

discussions that is not communicated to the prosecutor does not violate any constitutional right of the defendant). I thus dissent.

In addition, I am also unable to agree with this court's earlier decision that ruled Goodwin was not entitled to prosecutorial immunity. *Briggs v. Goodwin, supra.* As an employee of the Department of Justice, he was designated by the Attorney General to prosecute the case, and that constituted his entire authority. Our earlier decision fails to recognize the normal obligations of a prosecutor and draws an overly fine distinction in artificially bifurcating his role into "advocate" and "investigator" for the purpose of deciding whether immunity should attach.

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testimony of FBI agent Pence, who stated that he routinely passed on all information to Goodwin. Majority op. at n.23. But the gap between routine distribution and actual receipt of specific reports can only be bridged by speculation. While "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing [a summary judgment] motion," United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam), the majority confuses inference with speculation.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN BRIGGS, et al.,
Plaintiffs,

v. CIVIL ACTION
No. 74-803

GUY GOODWIN, et al.,
Defendants.

MEMORANDUM OPINION

Before the Court is Defendant's Motion for Summary Judgment in the above captioned case. Plaintiffs are former members of the Vietnam Veterans Against the War (VVAW). They are suing Defendant Goodwin, a former Department of Justice Attorney, alleging that he conspired to deprive Plaintiffs of various statutory and constitutional rights. The facts may be summarized as follows:

In January of 1972 the FBI commenced an investigation of Plaintiffs. In the spring and summer of 1972, Goodwin was the Chief of the Special Litigation Section of

the Internal Security Division of the Department of Justice. In June of 1972, Goodwin received an FBI report indicating that Plaintiffs intended to disrupt the Republican Convention, which was to commence later that summer. Prior to the convention, Goodwin went to Florida (where the convention was held) seeking indictments for alleged violations of federal law.

All persons known to have participated in meetings at which the disruption was planned were subpoenaed to appear before the grand jury. Among those subpoenaed were two FBI informers, Emerson Poe and Arthur Franz.[5] None of the plaintiffs testified before the grand

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[5]Franz left Florida prior to the grand jury proceedings, and it is not contended that he participated in the alleged conspiracy.

jury, and an indictment was returned on July 13, 1972. Several months later a superceding indictment was returned by another grand jury when new evidence indicated that Plaintiffs Briggs and Michaelson were involved in the criminal activity that was the subject of the July 13 indictment.

Prior to his trip to Florida, Goodwin gave instructions to the FBI that were designed to protect Plaintiffs' Sixth Amendment rights. He told Claude Meadow (the FBI agent who was Poe's sole contact) to inform Poe that he should refrain from involving himself with the planning of any defense strategy, and, should he overhear such strategy being discussed, Poe was not to relay the information to the FBI. Meadow issued Goodwin's instructions to Poe, and informed Goodwin that Poe would comply with them. Goodwin had no direct contact with Poe.

Because Plaintiffs were hastily subpoenaed, they were represented by common counsel at the grand jury proceedings. Many Plaintiffs met each other for the first time as a result of those proceedings. They were therefore concerned that there might be an informer in their midst who would be privy to defense strategy. This fear was accentuated because Plaintiffs were represented by common counsel and defense strategy was, in many instances, jointly planned.

Emerson Poe signed two documents, both undated, authorizing VVAW's defense attorneys to represent him in a limited manner. The first document authorized representation in proceedings which sought to delay the grand jury until counsel could be retained. VVAW's Motion for Stay was denied on July 11, 1972. The second document authorized representation in matters of "affirmative action" until Poe

could retain his own counsel. According to Poe, he signed the first document on or about July 8, 1972, and signed the second document after he was dismissed by the grand jury on July 13, 1972. There is no evidence to the contrary.

On July 12, 1972, the District Court for the Northern District of Florida heard argument from Plaintiffs about their entitlement to certain information, including the existence vel non of any evidence that informants of the government were among those witnesses who were represented by counsel at the grand jury. The July 12th hearing was marked by confusion as to what witnesses VVAW's counsel were representing for grand jury purposes. Prior to July 12, 1972, the government had not been presented with a list of witnesses who were so represented. At the July 12th hearing, defense counsel stated, after Emerson Poe's name was

mentioned, that "... I have just been informed that Mr. Poe, who I believe originally was not represented by counsel..." and was then interrupted by another defense counsel, who stated "[j]ust for the Sixth Amendment motion that Your Honor ruled on the other day..."

While this discussion is a bit confused, it supports Poe's assertion that prior to July 14th he was represented by counsel only for the motion to stay the grand jury proceedings. On July 13, 1972, this colloquy occurred under oath:

The Court: Mr. Goodwin, are any of the witnesses represented by counsel agents or informants of the United States of America?

The Witness: No, Your Honor.

The Court: You can step down.

The Court's statement "witnesses represented by counsel" refers to witnesses identified by defense counsel on July

12th. It is Defendant's negative assertion to the Court's question that has given rise to the instant litigation. Plaintiffs contend that Defendant knew or should have known that Emerson Poe was represented by their counsel and therefore knew or should have known that their Sixth Amendment rights were being violated.

Defendant contends in his Motion for Summary Judgment that (1) he is entitled to absolute prosecutorial immunity, or (2) assuming arguendo he is not so entitled, qualified prosecutorial immunity precludes further prosecution of this litigation. It is clear that a prosecutor enjoys absolute immunity when his activities are quasi-judicial in nature. Butz v. Economu, 438 U.S. 478, 516 (1978); Imbler v. Pachtman, 424 U.S. 409, 431 (1976). When a prosecutor transcends his role as an advocate, and instead performs investigatory activities, his immunity

from suit is qualified, rather than absolute. Briggs v. Goodwin, 569 F.2d 10, 16 (D.C. Cir. 1977). In the instant case, Plaintiffs allege that Goodwin violated their Sixth Amendment rights by planting an informer in their midst and perjuring himself. To ascertain whether Defendant is entitled to absolute or qualified immunity, the Court must scrutinize what type of activity he was engaging in when he performed the facts that form the basis of Plaintiffs' complaint.

Poe was subpoenaed in order to preserve his role as an informer. Goodwin's response was likewise designed so that Poe could maintain that role. Goodwin desired to preserve Poe's position in order to facilitate the investigation of the VVAW. Defendant's assertion that he was acting in a quasi-judicial manner within the meaning of Imbler v. Pachtman,

supra, is therefore misplaced. Defendant is not entitled to absolute immunity.

As the Court of Appeals noted in Briggs v. Goodwin, Defendant is entitled to a qualified immunity. If Goodwin shows that "he entertained a good-faith, reasonable belief in the truth of his response to the federal district judge in Florida," id., at 16, then he is immune from liability. The facts, as developed by discovery and the extensive record before the Court, establish that Goodwin in fact believed in the veracity of his statement.

First, the deposition testimony of Goodwin, Meadow, and others connected with the grand jury investigation reveals that Defendant issued strict instructions to Poe designed to preclude Poe's participation in the common defense. Second, it is clear from the deposition testimony that Goodwin believed Poe was heeding those instructions. Third, Poe believed and

still believes that he in fact followed Goodwin's instructions, and he therefore did not inform Goodwin to the contrary. Fourth, the evidence supporting Plaintiffs' assertion that Poe was cognizant of some defense strategy also indicates that Goodwin was not privy to this information when he made his assertion to Judge Middlebrooks. Finally, the assertions of defense counsel on July 12th indicating that Poe was not being represented supported Goodwin's belief that Poe was in fact not represented by counsel. It is clear that Goodwin did not perjure himself on July 13, 1972.

The only remaining issue before the Court is whether summary judgment is appropriate in the instant action. As the Supreme Court noted in Butz v. Economu, supra, at 508,

> [D]amages suits concerning constitutional violations need not proceed at trial, but can be terminated

> on a properly supported motion for summary judgment based on the defense of immunity... In responding to such a motion plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Because Defendant has proved that he entertained a good-faith, reasonable belief in the truth of his statement, he is entitled to summary judgment. Butz v. Economu, supra; Briggs v. Goodwin, supra. An appropriate Order follows this Memorandum Opinion.

Aubrey E. Robinson, Jr.
United States District Judge

Date: September 19, 1980.

ORDER

Upon consideration of Defendant's Motion for Summary Judgment, Plaintiffs' Opposition thereto, the entire record

therein, and the Memorandum Opinion issued by the Court this date, it is by the Court this 19th day of September, 1980,

ORDERED, that Defendant's Motion for Summary Judgment, be and hereby is, GRANTED.

Aubrey E. Robinson, Jr.
United States District Judge